In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1550

BEATRICE SILK, PETITIONER

v.

THOMAS S. KLEPPE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Petitioner was employed by the Small Business Administration, initially in 1960 as a clerk, grade GS–5; she was promoted in 1962 to Placement and Classification Assistant, grade GS–7. In 1963, she appealed to the Civil Service Commission for an increase in grade. In April 1964, the Commission's Regional Office in Boston, Massachusetts, informed her by letter that, in view of the functions she performed, her position did not support her GS–7 grade and that it was therefore recommending a reclassification of her position by the SBA to Personnel Clerk, having the lower level of GS–5.

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The SBA followed this recommendation and petitioner appealed. After a hearing by the SBA, the hearing examiner upheld the job reclassification. Petitioner appealed to the Boston Regional Office of the Civil Service Commission and was given another hearing (5 C.F.R. 752.203, 772.305). In May 1965, the Appeals Examiner held that the SBA action had been procedurally defective (Pet. Exh. F).[1] The SBA appealed that determination to the Commission's Board of Appeals and Review (5 C.F.R. 772.307), which in November 1965 reversed, upholding the SBA job reclassification. Petitioner's subsequent requests that the Board reconsider its decision and that the Commissioners reopen and review her case were denied.

Petitioner filed the present action in the United States District Court for the District of Massachusetts in 1969, naming as defendants the Administrator of the SBA and the Chairman of the Civil Service Commission. Defendants moved to dismiss the complaint on several grounds, including that petitioner had failed to join the individual Civil Service Commissioners, indispensable parties to the action.[2] During a hearing on the motion, the court advised petitioner to obtain an attorney and return in two months'

[1] The Examiner found that the SBA action was due either to a reduction in work-force or to personal reasons and therefore did not comply with the applicable procedural requirements—if the former, petitioner had not been changed to a position already in existence; if the latter, she had not been given advance notice by the SBA of those personal reasons (Pet. Exh. F, pp. 5–6).

[2] See *Blackmar* v. *Guerre*, 342 U.S. 512.

time. Thereafter, petitioner, acting *pro se,* on two occasions sought to amend her complaint in certain respects, but she declined to join the individual Commissioners; she then moved for summary judgment.

On July 8, 1970, the district court granted the defendants' earlier motion to dismiss. On petitioner's motion to vacate, however, the court reconsidered its dismissal order at a further hearing on July 16, 1970. On July 21, 1970, it affirmed the earlier dismissal. Petitioner filed a second motion to vacate the order, and, on August 12, 1970, the court vacated that order by entering a new one dismissing the complaint for failure to join indispensable parties. On September 9, 1970, petitioner moved to vacate the August 12 dismissal order (Pet. Exh. C), and this motion was denied on October 15, 1970.

Petitioner filed a notice of appeal on November 12, 1970; defendants moved to dismiss the appeal on the ground that petitioner's September 9 motion to vacate was untimely under Rule 59(e), Fed. R. Civ. P.[3] The court of appeals, declining to dismiss the appeal, affirmed the October 15 order of the district court (Pet. Exh. A and B). The court ruled that petitioner's September 9, 1970 motion to vacate had not been timely filed under Rue 59(e), Fed. R. Civ. P., and thus did not stay the running of the 30-day period within which to appeal the district court's order of August 12, 1970. Hence the November 12, 1970 notice of ap-

[3] Rule 59(e), F.R. Civ. P., provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

peal was filed out of time with respect to that order under Rule 4a, Fed. R. App. P. The court of appeals held that the notice of appeal was timely with respect to the subsequent October 15, 1970 district court order. But as to that order, the court ruled that the district court had properly denied petitioner's September 9 motion to vacate since it was filed out of time under Rule 59(e), Fed. R. Civ. P.[4]

A timely petition for rehearing was denied on January 18, 1971 (Pet. Exh. D).

2. The petition presents only a narrow procedural question as to timeliness which turns on the particular circumstances of this case. The courts below afforded petitioner every consideration, including liberal interpretations of procedural and jurisdictional requirements, in resolving the issue raised, and correctly decided the question. There is thus no cause for further review.

3. Moreover, aside from the timeliness question, petitioner is entitled to no relief on the merits of her claim. Contrary to her assertion (Pet. 4), the SBA was not required to take corrective action in accordance with the May 1965 determination of the Civil Service Commission Appeals Examiner (Pet. Exh. F).

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[4] The court below (Pet. Exh. B) rejected petitioner's contention that her September 9 motion should be treated as a motion for relief from a final judgment or order by reason of "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1), F.R. Civ. P., which can be "made within a reasonable time." It concluded (Pet. Exh. B, p. 3) that petitioner's "motion is based on the broad ground that the court made an erroneous ruling," and therefore is not within the intended scope of Rule 60(b)(1), which is "addressed to some special situations justifying extraordinary relief."

The Commission's Board of Appeals and Review fully considered and reversed that determination, finding that the SBA job reclassification "was not unreasonable, arbitrary or capricious, and that it was for such cause as will promote the efficiency of the service."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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